Hariram Jayaram v Saraswathy Rajahram

HIGH COURT (KUALA LUMPUR) — DIVORCE PETITION NO S7(33)-47-366 OF 1988
LIM BENG CHOON J
28 AUGUST 1989

Family Law — Divorce — Grounds of — Whether marriage had broken down irretrievably — Evidence required — Law Reform (Marriage and Divorce) Act 1976, ss 53(1), 54(1)(b) & (d)

The petitioner and the respondent in this case were married on 15 March 1972. They both resided at the matrimonial home until 16 April 1986 when the petitioner left the place and moved. There is no child from the marriage. On 21 May 1988, the petitioner filed this petition alleging that the marriage had broken down irretrievably and that the parties to the marriage had lived apart for a continuous period of at least two years immediately preceding the presentation of the petition. No other allegation was made apart from the allegation that attempts at reconciliation had failed. The respondent, by her answer filed on 26 September 1988, denied the allegations.

Held, allowing the petition:

(1) In considering a petition for divorce, the court is required, pursuant to s 53(1) of the Law Reform (Marriage and Divorce) Act 1976 to inquire into the facts alleged as causing or leading to the breakdown of the marriage.

(2) The petitioner had satisfied the court of the fact in relation to the marriage as set out in s 54(1)(b) of the Law Reform (Marriage and Divorce) Act 1967 in that the respondent was of such a character and personality and behaviour that the petitioner could not reasonably be expected to live with her.

(3) The court was to examine the whole of the evidence placed before it including, and giving not inconsiderable weight to, the assertions of the parties and determine whether it can be said that inspite of the behaviour of the wife and the reaction to that behaviour of the husband, the marriage has not broken down irretrievably.

[*Editorial Note*: The respondent has appealed to the Supreme Court vide Civil Appeal No 02-374 of 1989.]

Cases referred to

1 *Ash* v *Ash* [1972] 1 All ER 582 (refd)
2 *Katz* v *Katz* [1972] 1 WLR 955 (refd)
3 *Pheasant* v *Pheasant* [1972] 2 WLR 353 (refd)

Legislation referred to

Law Reform (Marriage and Divorce) Act 1976 ss 53(1), 54(1)(b), (d)
Divorce Reform Act 1969 [UK] s 2(1)(b)

Sivaloganathan s/o Yoganathan for the petitioner.
Ronald Khoo for the respondent.

Cur Adv Vult

Lim Beng Choon J: The petitioner and the respondent in this case, Hariram Jayaram and Saraswathy Rajahram, were married on 15 March 1972. At the time of the marriage, they were respectively 33 and 34 years of age. The matrimonial home was at all material times at 132-D Jalan Berhala, Kuala Lumpur. They both resided there until 16 April 1986 when the husband left the place and moved to 61-1E Rampai Court, Kuala Lumpur. He has been staying at Rampai Court since then. There is no child of the family.

On 21 May 1988, the husband filed his petition wherein he alleged that the marriage had broken down irretrievably and that the parties to the marriage had lived apart for a continuous period of at least two years immediately preceding the presentation of the petition. Apart from his averment that attempts at reconciliation between the petitioner and the respondent by the Marriage Tribunal at Kuala Lumpur had failed, no other allegation has been made as to why the marriage has broken down irretrievably. By her answer filed on 26 September 1988, the wife denied that the marriage had broken down irretrievably and stated that efforts were being made by her and members of their respective families to reconcile the marriage. She said that she cared for the petitioner very much and wished to be reconciled. She also said that the Marriage Tribunal at Kuala Lumpur did not make any attempt to reconcile the parties; neither was she given a fair hearing by the said Tribunal. The rest of her averments relate to her requests for maintenance. On 10 November 1988, the husband filed his reply. In that reply the husband made five specific allegations and they are these:

(1) The wife's conduct while the parties were living together was one of irresponsibility without any concern for the welfare and care of the husband and that her primary concern was how to care for cats and dogs. Details of such irresponsible conduct were stated in the reply.

(2) The wife stationed herself in the office premises of the husband's law firm although she had been persistently told by him not to do so.

(3) The wife took the liberty of entering into business and land deals with friends and clients of the husband, obtaining sizeable sums of money from them when there was no prospect of concluding the deals, on account of which a police report was lodged against her and various civil suits were commenced against her. In the result, the husband had to liquidate all his savings and borrow money from friends to settle her debts.

(4) Throughout, the conduct of the wife and her business activities were such that the husband's career and reputation as a practising lawyer were put at stake. In the result the husband was put under severe stress.

(5) The petitioner was induced by the respondent to enter into guarantees with certain banks mentioned in the reply for the benefit of the respondent. This resulted in legal proceedings being instituted against

the petitioner for payment of the guaranteed amount totalling more than $650,000.

On 17 November 1988, the petitioner obtained an interim injunction restraining the respondent from entering into or interfering with the reasonable occupation and enjoyment of the petitioner of his business premises. Both parties also filed in their respective affidavits containing accusations and counter-accusations revolving round the specific allegation stated above. I do not propose to reproduce at any length the contents of the affidavits. I shall be reverting to them if and when it is necessary.

Adverting to the evidence adduced at the trial of this case, the husband in his evidence described the marriage as a very unhappy one even from the very beginning. He tolerated as much as he could as he thought that given time the parties could solve their marital problem. According to him, signs of the breaking up of the marriage appeared ominously in 1981 when the parties started to live their separate ways. Although they still resided in the matrimonial home they stayed in separate rooms. There was no sexual relation between them and the parties had very little communication with each other. Again according to him, the situation was brought about by the wife's conduct — she would not accept any advice or suggestion from the petitioner and at any rate she would take upon herself to do just the opposite. As regards the cats and dogs incident, he said that at the material time the wife kept as many as eight cats and a stray dog in their apartment at Jalan Berhala. These animals caused a great deal of nuisance to the people who stayed in the neighbouring apartments. Complaints were accordingly made to him. They caused him great embarrassment because, as a practising lawyer, he knew or should have known that it is against the law to keep pets in apartments. In elaboration of the irresponsible conduct of the wife, he said that most of the time, if not always, his wife would not cook his meals and he had to eat outside. She would, so he said, only cook when she had to feed the cats. As regards the financial embarrassment caused to him by his wife, he spoke of the land dealings conducted by his wife with a Dr Yeoh in the course of which the latter had paid a sum of $100,000 to his wife. That transaction came to nought and the husband had to come to the rescue by borrowing a sum of $72,900 to repay to the solicitors for Dr Yeoh (see exh P3). The husband also spoke about how the wife persisted in using the office premises of his legal firm to conduct her own business against the wishes of the husband. He, however, admitted that when his wife closed down her pharmacy business soon after the marriage, he tried to get her interested in trade mark work in his law firm. But the wife found the work too difficult and gave up the idea. However, she continued to use the office premises and facilities to do her own estate agency work. As regards the bank guarantees, the husband said that he agreed to stand guarantee in respect of the loan given by United Asian Bank to finance her purchase of a house at Lengkok Abdullah in 1981. He agreed to do this on the understanding that his wife would repay the loan after she had sold her two shop-lots to her father. The loan was never repaid and in consequence United Asian Bank instituted proceeding against both husband and wife (see annexure HJ5 attached to encl 25). He had to pay $50,000 to United Asian Bank and a sum of $3,000 pm until the loan amounting to $280,000 was fully paid up. Furthermore, as a result of this transaction, there is a danger of his law firm being removed from the bank's panel of solicitors. He also stood guarantee for the loan given by Arab Malaysian Finance Bhd to his wife to buy two houses at Jalan Kamuja, Kuala Lumpur. Likewise this loan was never repaid and Arab Malaysian Finance instituted proceeding against both husband and wife (see annexure HJ6 attached to encl 26). In the result, the husband was asked to pay a sum of $3391 pm to Arab Malaysian Finance. These loan transactions caused much embarrassment to, as well as great financial strain on, him. In cross-examination, the husband was asked to explain why he stood guarantee for the two loans made on 15 July 1981 and 30 December 1981 respectively when his relationship with his wife, according to him, was no longer normal. He said that, at that point of time, he had not yet separated from his wife and on being asked by the banks concerned to sign the guarantees, he had to do so as he would not like to announce to the whole world his matrimonial problems. On being asked as to why he shared the same room with his wife when they went to Tokyo some time in 1985 to attend the Asian Patent Attorneys Meeting, the petitioner said that his wife did not go with him; she went on her own. They did share a same room in a hotel but he had to do so because each couple was alloted a room and it was difficult for him to refuse to accept the room as he was not prepared to wash dirty linen in public. At any rate, there was no sexual relationship and he also denied that his wife went there as representative of his law firm. He also admitted going with his wife to Taiwan in November 1983 and stayed with her in the same room in a hotel. There again there was no sexual relationship.

The respondent also gave evidence. She described the marriage as a good marriage and the parties could 'anticipate each others feeling and each others move'. They have an understanding that the marriage would last and nothing would break it. She denied that the breaking signs appeared in 1981 as her husband and she went to Australia to visit her brother. They were very happy. She emphasized that she was able to share with her husband in everything that he did, such as his involvement in the Sai Baba movement. She described her husband as a very sincere and intense person, meaning no doubt that he is a very sincere and earnest person. She also said that he is a very sensitive person and very tense over financial problems. When he started his law firm, he was not a very

confident person and she thought she could help him. With regard to her conduct, she denied that she refused to care or cook for her husband. She said that she did the cooking and when her husband was involved in the Sai Baba movement, she even cooked vegetarian meals for him. Sometimes he just would not like to eat the food she cooked and she had to give it to the cats. She explained that as their marriage was not 'sexually based', they mutually agreed to stay in separate room. One of the reasons for doing so was because her husband said she snored. She made no attempt to urge her husband to return after he left her on 16 April 1986 as she thought that it would be better if they were to lead separate lives for a time. She also said that she and her husband were instrumental in introducing clients from Singapore to his law firm. She also tendered two photographs of her husband and herself taken at Otani Hotel, Tokyo, where they stayed while they were attending the APAM conference in Tokyo. The photographs show that the petitioner was in a very happy mood. As regards the financial problems described by her husband, she said that she had given her explanation in her affidavit affirmed on 24 September 1988 (encl 13). At any rate, all the financial problems could be solved since the properties in Jalan Kemuja are now worth at least $1.3m.

It is to be noted that in her affidavit of 24 September 1988, she had asserted that the petitioner told her that he had not paid his income tax for some three years and that he owed the Inland Revenue over $50,000. In order to help him pay the arrears, she decided to sell her two shoplots in Ampang Park Shopping Centre to her father for $350,000. She also alleged that the United Asian Bank loan was taken on the instruction of the petitioner who refused to give her a reason as to why she should take the loan.

The petitioner was recalled to testify. He tendered the following documents to support his contention that he never owed the Inland Revenue anything.

(1) A bundle of notices of assessment and notices of additional assessment together with two letters from the Inland Revenue marked exh P11.
(2) A summary of the liability of the petitioner and that of the respondent marked P12.

So much regarding the evidence adduced at the trial.

Now, in his submission, learned counsel for the petitioner contended that in passing the Law Reform (Marriage and Divorce) Act 1976, Parliament had introduced a new conceptional basis for divorce generally. He said that in considering whether a marriage should be dissolved, the court was required only to consider whether the parties to the marriage had been living apart for a continuous period of two years or more immediately prior to the presentation of the petition. Upon proof of such a two-year separation, the court was bound to grant the divorce sought pursuant to s 54(1)(d) of the Law Reform (Marriage and Divorce) Act 1976 ('the Law Reform Act'). Fortunately, I do not have to rest my decision in this case on the basis suggested by learned counsel as there is ample evidence before me to enable me to reach a conclusion. In passing, I should perhaps say that I tend to agree with learned counsel for the respondent that, in considering a petition for divorce, the court is required pursuant to s 53(1) of the Law Reform Act to inquire into the facts alleged as causing or leading to the breakdown of the marriage. It is also worthy of notice that in enacting the Law Reform Act, Parliament has not yet completely assimilated the law relating to marriage and divorce into the law of partnership. However that may be, I do not think I need to labour on this point.

Looking at the answer filed by the respondent, she has, if I may say so, put her defence in two ways. First, she says that it should not be held that she had behaved in such a way that the husband cannot reasonably be expected to live with her. Second, if that be wrong she says that under s 54(2) of the Law Reform Act I should conclude that I am satisfied that in all the circumstances it would be wrong to dissolve the marriage.

I must therefore first consider the true construction of para (b) of s 54(1) of the Law Reform Act. That paragraph, which sets out one of the facts which has to be proved if a petitioner is to satisfy the court that the marriage has broken down irretrievably, reads as follows:

> that the respondent has behaved in such a way that the petitioner cannot reasonably be expected to live with the respondent;

The phrase 'cannot reasonably be expected to live with the respondent' also appears in para (b) of s 2(1) of the English Divorce Reform Act 1969. The scope and effect of this phrase has been exhaustively dealt with by Bagnall J in *Ash* v *Ash*[1] who has adopted a pragmatic approach in defining the scope and effect of the said phrase. However I do not propose to cite the relevant passage of the judgment containing the observation of the learned judge as I cannot say that I can agree with all that has been said. Moreover it is quite a lengthy passage. It is sufficient to state that I agree with the proposition of the learned judge that the 'petitioner' appearing in para (b) of the English Act means the particular petitioner in the case under consideration. The next question to ask and be answered is what is the standard of the behaviour to adopt in construing s 54(1)(b)? A useful test is stated by Sir George Baker P in *Katz* v *Katz*[2] at p 960:

> The standard is that he must behave 'in such a way that the petitioner cannot reasonably be expected to live with [him]'. That is the test. It is for the judge not the petitioner alone to decide whether the behaviour is sufficiently grave to fulfil that test, that is, to make it unreasonable to expect the

> petitioner to endure it, to live with the respondent. Also it is for the judge to say whether the marriage has irretrievably broken down. To that extent I agree with what Bagnall J said in *Ash* v *Ash* [1972] Fam 135. The court must consider the effect of the behaviour on the particular petitioner and ask the question is it established, not that she is tired of the respondent, or, colloquially, fed up with him, but that she cannot reasonably be expected to live with him. In a sense it seems to me wrong to call it, as we are apt to do, unreasonable behaviour. It is behaviour that causes the court to come to the conclusion that it is of such gravity that the wife cannot reasonably be expected to live with him.

Another useful case is *Pheasant* v *Pheasant*[3] where Ormrod J said:

> All these considerations point to only one conclusion, namely, that the test to be applied under sub-para (b) is closely similar to, but not necessarily identical with, that which was formerly used in relation to constructive desertion. I would not wish to see carried over into the new law all the technicalities which accumulated round the idea of constructive desertion but rather to use the broader approach indicated by Pearce J in *Lissack* v *Lissack* [1951] P1 and consider whether it is reasonable to expect this petitioner to put up with the behaviour of this respondent bearing in mind the characters and the difficulties of each of them, trying to be fair to both of them, and expecting neither heroic virtue or selfless abnegation from either. It would be consistent with the spirit of the new legislation if this problem were now to be approached more from the point of view of breach of obligation than in terms of the now out-moded idea of the matrimonial offence.

I shall turn now to assess the evidence adduced at the trial of this case. I have no doubt at all that the husband is a sensitive and upright person. He has devoted a great deal of time and effort, not to mention money, in building up his law firm. As can well be imagined, the husband was considerably upset when the wife tried to and did in fact intrude into the firm's premises to conduct her own business. It was, at best, a foolish thing to go to the premises and treat it as her place of business. The situation got worse when his firm's name and stature was nearly brought into disrepute by what I would call as the 'Dr Yeoh incident' and the 'bank loans incident'. The problem is compounded when the husband is put under severe financial strain resulting from the unfortunate transactions carried out by the wife and the failure on her part to pay her income tax. Then we have the 'cats and dogs incident' as narrated by the husband. His narration has not been shaken or challenged. No doubt this incident by itself is not serious; it is one of the negative attributes of any ordinary marriage life. However, when it is viewed in the light of the other incidents, it can widen the tear in the fabric of this marriage.

I shall now consider the wife's evidence. I can say at once that she does not impress me. She had a penchant for self-assertion. She was prepared to take advantage of the good and to enjoy the prosperity of her own business even at the risk of disturbing the orderly manner in which her husband tried to run his law firm. I say this because the wife had not denied her constant presence in her husband's law firm although, in giving her oral evidence, she tried to impress this court that she had to be there because she was at the material time helping her husband with his trade mark work and also bringing in clients for his firm. I am not prepared to accept her assertion as it has been shown in the evidence that her knowledge of trade mark work is unimpressive. As to her suggestion about introducing clients to her husband's firm, surely she could do that without stationing herself in her husband's office or even in the premises of her husband's law firm. It is interesting to note that in her affidavit affirmed on 27 March 1989 (encl 29), she stated at p 10 thereof that it was the husband who invited her to go to his office every day and she went there to keep a general eye on matters in the office. It is indeed strange that her husband, who is so methodical and is very concerned about his law practice, would need her to keep an eye on the affairs of the office. With regard to the 'Dr Yeoh incident', the wife in her affidavit affirmed on 27 March 1989 (encl 29) admitted that it was she who introduced this Dr Yeoh to purchase a portion of the property in question and the latter paid the purchase price to one Ghazali, the owner of the property. This Ghazali, according to her, cheated Dr Yeoh and she and her husband had to, to use her own words, 'settle whatever my friends had paid towards the land because I felt a moral obligation for introducing them to the investment'. Her assertion, to my mind, is no answer to her husband's allegation. If she is completely innocent about the whole affair, it is amazing that she was prepared to pay a sum of $100,000 to Dr Yeoh without even trying to compel this Ghazali to contribute a single cent. If her evidence is worth anything, it serves only to support her husband's contention that, to use his own works: 'I was landed with the heavy task of bailing the respondent from the abortive schemes and meeting the financial and other demands of the victims of her mischief'. (See p 3 of his affidavit affirmed on 31 January 1989 (encl 25).) On the matter of the 'loans incident', again the respondent had no answer to the petitioner's allegations. In her affidavit she suggested that the United Asian Bank loan was taken out on the instruction of the husband who would not give her any reason for doing so. She had also suggested that since she had no income and was working full time in her husband's office, it was logical to expect her husband to pay the bank or to pay her a salary so that she could make payment to the bank. In the circumstances of this case, such suggestions are best said and be rejected.

The wife also suggested that she had to sell the two shop-lots in the Ampang Park Shopping Centre in order to help the husband to pay his income tax of $50,000. Needless to say this is not true; the husband has proved to my satisfaction that he owed the Inland Revenue nothing. Indeed he had overpaid the Inland Revenue.

It is also interesting to note that a large part of her oral evidence relates to the few overseas trips she made with the husband to attend the Association of Patent Attorneys conference. She even tendered two photographs to show that she and the husband were enjoying themselves and were very happy. It is true that the husband appeared to be in a happy mood. But from the evidence I accept the husband's explanation when he said, although the marriage had broken down, he had to put up a front as he would not like to wash dirty linen in public.

I shall now apply the legal principles set out earlier to the facts of this case. Apart from my clear impression that the wife showed a lack of understanding of the problems of her husband, I have reached a conclusion that she has not shown herself to be of such a character and personality and her behaviour has not been such that I can conclude that the husband can reasonably be expected to live with her. I therefore hold that the husband has satisfied this court of the fact in relation to this marriage as set out in para (b) of s 54(1) of the Law Reform Act.

As to the wife's second submission, namely, that the marriage has not broken down irretrievably, the wife says and undoubtedly believes that what is involved is a temporary difficulty attributable partly to a misunderstanding and partly to the temporary financial problem facing her husband which can be solved. The husband is adamant that the marriage is at an end and states with force and conviction in the witness box that there is no possibility of his contemplating living with the wife as her husband. As a matter of law, simple assertion either way cannot suffice. What the court has to do is to examine the whole of the evidence placed before it including, and giving not inconsiderable weight to, the assertions of the parties and determine whether it can be said that in spite of the behaviour of the wife and the reaction to that behaviour of the husband, the marriage has not broken down irretreivably. Doing the best I can and having regard to the manner in which the parties gave evidence in the witness box and the circumstances of this case, I am satisfied that the marriage has broken down irretrievably. That being my finding and bearing in mind the following passage from the Law Commission Report (Cmd 3123) on the 1969 English legislation at para 15:

> (i) To buttress, rather than to undermine the stability of marriage and (ii) when regrettably, a marriage has irretrievably broken down, to enable the empty legal shell to be destroyed with the maximum fairness and the minimum bitterness distress and humiliation.

I have no alternative but to grant a decree nisi.

Petition allowed.

Solicitors: *Siva, Thurai, Mariany & Co; Shearn Delamore & Co.*

Reported by *Kevin Mathews*

Re Ismail bin Daud & Anor, ex p Universal Life & General Insurance Sdn Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D3-43-4873-88
VC GEORGE J
29 SEPTEMBER 1989

Bankruptcy — Bankruptcy notice — Sum demanded — Computation of amount — Interest on judgment debt included — Uncertainty or ambiguity in notice — Whether debtor misled — Duty of court and Official Assignee — Bankruptcy Act 1967, ss 3(1)(i), 3(2)(ii) & 131

A bankruptcy petition was presented by a judgment creditor on the ground that the two respondents had failed to comply with the bankruptcy notices that had been served on them. It was contended for the Official Aassignee that the bankruptcy notices were invalid and that accordingly the subsequent proceedings therefrom were a nullity. The date of each bankruptcy notice was 11 August 1988 and was based on a default judgment dated 20 May 1988. The objection was based on the ground that interest on the judgment was calculated only up to 30 June 1988 and that in respect of the period from 1 July 1988 to 11 August 1988 the amount of interest was not calculated and further that it was left to the judgment debtor concerned to calculate the amount albeit based on the formula set out in the judgment of 8% pa on the principal amount. It was contended that the judgment debtor having to find out by calculation what the interest payable was, made each of the notices invalid and that accordingly the petition was a nullity.

Held, dismissing the petition:

(1) If the amount specified in the notice is quantified or is quantifiable then, even if the amount demanded exceeds the amount actually due under such a notice, the notice will not per se be invalidated unless the debtor within the prescribed seven days gives notice to the creditor that he disputes the validity of the notice on the ground of the mistake. In the absence of a dispute by the debtor of the quantum, it is not for the court or the Official Assignee to question the quantum of the amount claimed in the notice.

(2) So long as the amount demanded is in accordance with the terms of the judgment or order and is quantifiable on the date of the notice, and all the ingredients necessary to so quantify the amount payable are provided in the notice without uncertainty or ambiguity, such a notice per se is not bad.

(3) Where in the body of the notice, to the ingredients for calculating the interest ordered, the words 'and continuing' or other words of like effect are appended, that could amount to the demand being uncertain and as such bad. Where in the body of the notice there are no such words but in the particulars appended to the notice those words appear and have the effect of giving particulars of the judgment or order on the basis of which the notice is given, that does not necessarily make the notice bad for uncertainty. What is relevant is what is demanded and if what is demanded is exact, then such a notice is not necessarily bad for uncertainty.

(4) In the instant petition the use of the words 'and still continuing' in respect of interest in the body of the notice and the words 'with further interest on $10,526.72 at the rate of 8% pa from 1 July 1988 to the date of final payment or of receiving and adjudication orders' in the particulars had the combined effect